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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 131

ROBERT E. LEE & CO., INC., and DIXIE CONSTRUCTION COMPANY OF GEORGIA, INC., *Petitioners*,

v.

NATHAN THOMAS VEATCH and THOMAS B. ROBINSON, doing business as BLACK & VEATCH, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

NATHAN THOMAS VEATCH and THOMAS B. ROBINSON, doing business as BLACK & VEATCH, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on February 24, 1962.

OPINIONS BELOW

The opinion of the District Court for the Western District of South Carolina is reported at 195 F.Supp. 528. The United States Court of Appeals for the Fourth Circuit rendered an opinion reversing the District Court. This opinion has not as yet been reported but is set forth and printed in the Appendix hereto.

A Petition for Rehearing was filed by the petitioners on January 5, 1962. On January 12, 1962 an Order was entered directing the respondents to file, within twenty (20) days from that date, an answer to the petition for rehearing. On January 22, 1962, by order of Simon E. Sobeloff, Chief Judge, the time for filing the answer to the petition for rehearing was extended for a period of ten (10) days to February 10, 1962. The respondents filed their timely answer to petitioners' petition for rehearing.

On February 24, 1962 the Court denied the petition for rehearing.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

FEDERAL STATUTES INVOLVED

This case involved the construction of Section 28 U.S.C. 1391 (a) and 1391 (c). These particular provisions governing venue in the Federal courts read as follows:

> "1391. Venue generally
>
> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.
>
> * * * * * * * * * *
>
> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

STATEMENT

Dixie,[1] a Georgia corporation, and Lee,[2] a South Carolina corporation with its principal place of business in Manning in the Eastern District of that state, filed a complaint in the Greenville Division of the Western District of South Carolina seeking damages against Black & Veatch in the amount of Two Hundred Forty-six Thousand, One Hundred Eighty-nine and 59/100 ($246,189.59) Dollars, plus interest and costs of court. The complaint alleged that Black & Veatch, a partnership with none of the partners residents of South Carolina, was doing business in Greenville County in the Western District of South Carolina, had done business there over the past years and had rendered services for the Cities and Commissions of Greenville and Greenwood, South Carolina, involving the expenditure of millions of dollars. The complaint defined the business performed by the respondents generally as the furnishing of engineering services to various political subdivisions and the assembling of plans, specifications, and the usual other related documents which enabled contractors to bid on the construction of water supply facilities in various parts of the United States, and it particularized the details under which respondents prepared the data upon which bids were submitted for the construction of a forty-eight (48) inch pipe line from North Saluda Reservoir near Greenville to Travelers Rest, South Carolina,

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[1] Dixie Construction Company of Georgia, Inc., herein referred to as Dixie for purposes of brevity.

[2] Robert E. Lee & Co., Inc., for the same reason, will be referred to as Lee.

The complaint then alleged that Dixie and Lee, pursuant to the plans and specifications prepared by respondents, submitted a joint bid of Six Hundred Forty-nine Thousand, Eight Hundred Fifty-one and 80/100 ($649,851.80) Dollars to install the water system which, as the lowest bid, was accepted by the Commission of Public Works of the City of Greenville; the complaint further alleged that the petitioners have completed the work to be performed under the contract and the completed work has been approved by the respondents, as the engineering firm for the Commission of Public Works of the City of Greenville. It further alleged that petitioners relied upon findings discovered by certain auger borings or test holes, the results of which were inserted on the plans and specifications, and upon which respondents relied in formulating their bid; that the auger borings or test holes, made by respondents, and disclosed and shown on the plans and specifications, failed absolutely and unequivocally to reveal the existence of substantial ground water which, beyond question, was encountered when the borings and test holes were made, by and under the supervision and control of respondents; it then went on to allege that the failure to reveal the true condition of the ground water and sub-soil conditions necessitated extensive single and double well pointing methods by respondents in the excavation of approximately 35,000 of the 77,559 feet covered by the contract.

The complaint further alleged that the petitioners were entitled to rely on the plans and specifications prepared by the respondents in computing their joint bid submitted to the Commission of Public Works of the City of Greenville which was accepted, finalized

into a contract and under which the extensive work was done.

The jurisdictional facts again briefly were:

1. That Lee was and is a corporation of South Carolina, with its principal place of business in the Western District of South Carolina, and, at all times pertinent to the complaint, was licensed to do and was doing business in Greenville in the Western District of South Carolina and was licensed to do and was doing business in the said district at the time of the alleged tortious conduct on the part of respondents.

2. That Dixie was and is a Georgia corporation likewise licensed to do business and doing business in South Carolina at the same relevant points in time.

3. That respondents, Black & Veatch, were an unincorporated association, or partnership, none of the parties being residents of the State of South Carolina but doing extensive business in Greenville County in the Western District of South Carolina from which business activities the damages were alleged to have been sustained by petitioners.

The matter came on for hearing before Chief Judge Charles C. Wyche and the Court, pointing out that the question as to whether or not the language of 28 U.S.C. 1391 (c) was applicable to plaintiff corporations had resulted in an irreconcilable split in authorities and, recognizing the basic problem as to venue, refused to grant the respondents' motion to dismiss and invited counsel to put to use the provisions of 28 U.S.C. 1292 (b) to settle the venue problem at the threshold though his ruling was admittedly interlocutory in nature.

The Court of Appeals for the Fourth Circuit permitted the interlocutory appeal to review the District Court's ruling that venue had been properly laid by petitioners.

On December 8, 1961, the Court of Appeals in an opinion authored by Chief Judge Sobeloff reversed the lower court, holding that petitioners, as plaintiff corporations, could not avail themselves of the provisions of 28 U.S.C. 1391 (c).

The petitioners then filed a petition for rehearing alleging that venue, under the General Venue Statute, had been properly laid under 28 U.S.C. 1391 in the Western District of South Carolina. On January 12, 1962, Chief Judge Simon E. Sobeloff entered an order directing the respondents to file, within twenty (20) days from the date of the order, an answer to the petition for rehearing filed by the petitioners on January 5, 1962. The answer was filed by the respondents and, under date of February 24, 1962 by order of Chief Judge Simon E. Sobeloff and Circuit Judges Morris A. Soper and Herbert S. Boreman, the following Order was entered:

> "Upon consideration of the briefs of the parties the court hereby denies the motion for rehearing."

QUESTIONS PRESENTED

The questions presented are:

1. Do the provisions of 28 U.S.C. 1391 (c) permit the plaintiff corporations, Dixie, a Georgia corporation, and Lee, a South Carolina corporation with its principal place of business in the Eastern District of South Carolina, petitioners herein, to lay proper venue in the Greenville Division of the Western District of

South Carolina against respondents, a partnership with all partners non-residents of South Carolina, by reason of the fact that the said corporations were licensed to do business and were doing business in Greenville County in the Western District of South Carolina both (i) at the time of the alleged damages suffered at the hands of respondents, and (ii) on the date of the filing of the complaint or, expressing it in another fashion, do the provisions of 28 U.S.C. 1391 (c) apply to a corporation as plaintiff as well as to a corporation as defendant?

2. Have petitioners properly laid venue under 28 U.S.C. 1391 against respondents, a partnership engaged in multi-state activities doing business of an extensive nature in the Western District of South Carolina, on a cause of action arising out of alleged tortious acts there committed against petitioners?

3. Have respondents by their conduct in doing business of an extensive nature in the Western District of South Carolina waived objections to venue.

REASONS FOR GRANTING THE WRIT

We respectfully urge that the decision below should be reviewed for the following reasons:

1. It erroneously interprets 28 U.S.C. 1391 (c) and, in so doing, has decided an important question of Federal law which has not been, but should be, settled by this Court. Admittedly, the opinion of the Court below is the first that has decided this precise question on the Court of Appeals plateau since the revision of the Judiciary Act in 1948. Since that time a respectable body of case law has been created in the District Courts supporting the position now urged by peti-

tioners. Beginning with Judge Ryan's decision in *Frieday* v. *Cowdin*, 83 F.Supp. 516 (S.D.N.Y. 1949), many courts have carefully and, with infinite care, construed the wording of 1391 (c) and, in so construing, have squarely held that 1391 (c) applies to a plaintiff corporation and have found in its wording a statutory meaning squarely contrary to the interpretation placed upon it by Chief Judge Sobeloff in the opinion of December 8, 1961. The following eminent jurists are in accord with the position taken by the petitioners. Judge Freed in *Hadden* v. *Barrow, Wade, Guthrie & Co.*, 105 F.Supp. 530 (N.D. Ohio 1952); Judge Dimock in *Southern Paperboard Corp.* v. *United States*, 127 F.Supp. 649 (S.D.N.Y. 1955); Judge Lord in *Eastern Motor Express* v. *Espenshade*, 138 F.Supp. 426 (E.D. Pa. 1956); Judge Sheehy in *Standard Insurance Co.* v. *Isbell*, 143 F.Supp. 910 (E.D.Tex. 1956); Judge Warlick in *Travelers Insurance Co.* v. *Williams*, 164 F. Supp. 566 (W.D.N.C. 1958); and Judge Egan in *Consolidated Sun Ray, Inc.* v. *Steel Insurance Co.*, 190 F.Supp. 171 (E.D.Pa. 1961).

Perhaps the two best known authorities on federal procedure are in conflict. In footnote 4 of the opinion below it is stated as follows:

> "Professor Moore is of the view that the subsection does not define corporate residence generally. 1 Moore, Federal Practice 1503 (2d ed. 1950).
>
> "Barron and Holtzoff think otherwise. 1 Barron and Holtzoff, Federal Practice and Procedure 387-88 (rev. ed. 1960)."

We respectfully urge that the Court resolve this issue and lay at rest the various interpretations which

have arisen with respect to plaintiff corporations in seeking to lay venue under 28 U.S.C. 1391 (c).[3]

2. It, on petition for rehearing and after consideration of the briefs, erred in not holding that the respondents, a foreign partnership conducting extensive business activities in the Western District of South Carolina, did not there reside for purposes of venue. The short answer to the contrary is to be found in *Portsmouth Baseball Corp.* v. *Frick*, 132 F.Supp. 922 (S.D. N.Y. 1955). There it was held that an unincorporated association "resides", within the meaning of 28 U.S.C. 1391 (b), in any district in which it does business. The *Portsmouth* case was a clear holding that venue is properly brought where an unincorporated association resides. The opinion is well reasoned: (a) the residence of an unincorporated association is to be determined under the rules applicable to corporations; (b) 1391 (c) provides that a corporation "resides" for venue purposes in any district in which it is doing business; and (c) therefore, an unincorporated association similarly "resides" in any district in which it is doing business.

The important step in the above reasoning is the first. The court said:

> "Sperry Products v. Association of American R.R., 2 Cir., 132 F.2d 408, 145 A.L.R. 694, seems

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[3] The irreconcilable case law has been thoroughly stated by the court below in footnote 3 to its decision.

[4] We respectfully urge that there is no true basis for a distinction between an unincorporated association and a partnership. Judge Hand in *Sperry*, supra, at page 410, states categorically that the common law assimilates an unincorporated association to a partnership.

> to me to hold that the rule for corporations holds for unincorporated associations. That case involved a question of venue of suit against an unincorporated association. Judge Learned Hand, for the court, 132 F.2d at page 411, came to the conclusion that, for venue purposes, those associations should be considered as jural entities, that the test for their location 'must always be what it is for a corporation outside the state of its incorporation' and that such an association is 'present' wherever any substantial part of its activities are carried on." 132 F.Supp. at 924-25.

It would seem that the wording of the General Venue Statute can be read consonant with a well considered public policy requiring a partnership, engaged in far flung multi-state business activities, to be assimilated to a corporation for venue purposes under 1391 (c).[5] Professor Moore states: "Although 28 U.S.C. 1391 (c) does not on its face apply to unincorporated association carries on multi-state activities, application of its principal is certainly justified."[6] and the rationale of *Firck, supra,* has been adopted in the well considered opinion of *American Airlines, Inc.* v. *Air Line Pilots Ass'n Inter.,* 169 F. Supp. 777 (S.D.N.Y. 1958). And on the venue issue the doctrine has gained such acceptance in the Southern District of New York that in 1960 Judge Weinfeld, in *R. & E. Dental Supply Co., Inc.* v. *Ritter Co., Inc.,* 185 F. Supp. 812, 813 (S.D.N.Y. 1959) could state with assurance: "Both sides agree that on the venue issue the test is the

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[5] See annotations at 94 L.Ed. 1167, at page 1175, for expanding concept of jurisdiction generally in the light of International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[6] 1 Moore, Federal Practice and Procedure (2d ed.) p. 1508.

same as that applied to a corporation outside the state of its incorporation."

The allegations of the complaint point up the substantiality of business activity which had been done and was being done by respondents in the Western District of South Carolina at the time the complaint was filed. The form in which the respondents have chosen to conduct its business activities, in and of itself, would not seem to offer a valid distinction for permitting venue to be laid against a corporation doing business in a given district and to deny venue against an entity there doing business and which has all the functional attributes of a corporation. The requirements of a sound public policy should, moreover, be consistent with practical realities. Judge Learned Hand, clearly recognized this when he said, as to an unincorporated association, in *Sperry*, supra, at page 411:

> "It does not violate common understanding to think of a common venture or enterprise as having spatial position wherever any part of those activities take place by which it is realized. That is a practicable test and it is really the only practicable test."

and while we admit the existence of authority to the effect that a partnership entity may not have a residence for purposes of venue other than at the residence of the partners themselves [*Great Southern Fireproof Hotel Co.* v. *Jones*, 177 U.S. 499 (1900); *Sutherland* v. *United States*, 74 F. 2d 89 (8 Cir., 1934); *Koons* v. *Kaiser*, 91 F. Supp. 511 (D.C. 1950); *Gross* v. *Miller*, 8 Federal Rules Service § 19a.1 (Case 1); 1 Moore, Federal Practice 1505, n9 (2d ed. 1950)], a close read-

ing of the cases would not seem to preclude a holding that a partnership, conducting business as Black & Veatch so does under the allegations of the complaint, should be subject to proper venue under 28 U.S.C. 1391 (b) on the theory that it resides where it is doing business and where it commits a tort which arises out of the very business conducted in the District where venue is sought to be laid against it. And, moreover, it has been held that the partnership has a separate entity for purposes of venue in *Darby* v. *Philadelphia Transfer Co.*, 73 F. Supp. 522 (E.D.Pa. 1947) and in *Eastern Motor Express* v. *Espenshade*, 138 F. Supp. 426 at 431 (E.D. Pa. 1956).

3. We respectfully urge that the case at bar is more nearly akin to *Neirbo Co.* v. *Bethlehem Ship Building Corp.*, 308 U.S. 165 (1939) than it is to *Olberding* v. *Illinois Central Ry.*, 346 U.S. 338 (1953). In *Neirbo* it was held that, where jurisdiction was based upon diversity of citizenship, a foreign corporation by qualifying to do business in a state and having consented to be sued in the courts of the state had likewise consented to be sued in the federal courts of that state. In *Olberding* the court refused to extend the doctrine to suits against individual defendants arising under state nonresident motor vehicle statutes. Mr. Justice Frankfurter felt that to subscribe a waiver of federal venue rights to *Olberding*, a citizen of Indiana, blithely using a Kentucky highway, would "surely to move in the world of Alice in Wonderland." This felicitious analysis of an unacceptable fiction is keyed to reality, but with deference, we urge there would seem to be a present hiatus between these two landmark decisions which should be the subject of present judicial clarification. In the case at bar, we find a partnership conducting

substantial business in the Western District of South Carolina and, under its aegis, the petitioners were invited to bid upon plans and specifications prepared and submitted by it. The petitioners completed their work under the supervision and direction of respondents in Western District of South Carolina and, according to the allegations of the complaint, there the petitioners received serious financial harm because of the business activities of the respondents in failing to reveal properly the existence of ground water which they encountered upon making test holes and auger borings. Service of process was there had upon their agent and, certainly, it cannot be disputed that the due process requirement of *International Shoe Company* v. *Washington*, 326 U.S. 310 (1945) is more than adequately satisfied.

The argument would seem to come to the basic question: Is the conducting of intense business activities within a state such a course of conduct as will constitute a waiver of venue under *Neirbo?* We respectfully urge that the court should grant the writ because this important question remains unresolved and certainly would seem to warrant further clarification. There would seem to be no doubt that a partnership might waive venue in similar fashion to a corporation. If it is assumed *arguendo,* that 1391 (c) does not assimilate a partnership to a corporation and thus does not bring the partnership entity within its ambit, the enactment of 1391 (c) containing as it does the doing business concept with respect to corporations, might leave partnerships and incorporated associations floating in uncertain limbo under the venue statute. Professor Moore points out the continuing importance of *Neirbo* and its impact on 1391 (c) in the following fashion:

"This doctrine of waiver is now relatively unimportant where the defendant is a corporation, because of the broad provisions of § 1391 (c), *supra;* and mainly is important where the defendant, or one of the defendants, is an individual or a non-corporate entity, such as a partnership or an unincorporated association."[1]

The theory that we respectfully urge for a partnership, namely, that a continuity of intense local business activity within a district constitutes a waiver under *Neirbo,* has very persuasive authority with respect to a corporation in *Knott Corp. v. Furman,* 163 F.2d 199, 204 (4th Cir. 1947) where the late, great Circuit Judge Parker, prior to the enactment of the Judiciary Act of 1948 and the broadened scope of 1391 (c), stated:

"Applying to the case at bar the 'common sense' which Chief Justice Waite is said by the Supreme Court to have applied in the Schollenberger case, we think it clear that with respect to waiving the provisions of the federal venue statute there can be no distinction between the consent to suit and service of process implied from doing business in the state and that arising out of appointment of a process agent, so that where a foreign corporation has given such consent as subjects it to suit in the courts of the state, the same consent subjects it to suit in the federal courts there sitting if the elements of federal jurisdiction are present. Or to put the matter concretely, the consent implied from doing business in the state not only authorizes suit in the courts of the state, with service of process upon a designated state officer, but also waives the provisions of the federal venue statute so that suit can be brought in the federal court, if the elements of federal jurisdiction are present."

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[1] 3 Moore, Federal Practice, 2d ed., p. 2139.

A very recent and exhaustive annotation at 5 L.Ed 2d 1056, at page 1074, on Waiver of Venue, classifies the view taken by Judge Parker as an eloquent presentation of the view that a foreign corporation waives its federal venue privileges merely by doing business in a state, even though it does not appoint a process agent there. Admittedly, further on in the annotation, on the same page, it questions the validity of *Knott* by pointing out the holding in *Olberding*. And there are decisions that hold that, if a corporation fails to appoint an agent even though a statute requires it to do so, there can be no consent to suit. *Moss* v. *Atlantic Coast Line R. Co.*, 149 F.2d 701 (CCA2d, 1945); *Robinson* v. *Coos Bay Pulp Corp.*, 147 F.2d 512 (CCA3d, 1945); *Knabloch* v. *M. W. Kellogg Co.*, 154 F.2d 45 (CCA5th, 1946); *Donahue* v. *M. A. Henry Co.*, 78 F.Supp. 91 (S.D.N.Y. 1948). But it would seem that, in a partnership case, a waiver of venue could well be implied under the following conditions, all of which are present in the instant case, which we seek to have reviewed:

(a) The partnership conducts multi-state local business activities with a substantial proportion of these business activities being carried on in the district in which venue is attempted to be laid,

(b) The cause of action arises out of an act, or series of acts, which took place within the district where venue is sought to be laid,

(c) There is no indication of devious forum shopping on the part of the plaintiffs seeking to lay venue against the partnership,

(d) Service is perfected upon an agent of the partnership who is within the district on partnership business when he is served, and

(e) The convenience of the parties can best be served by permitting venue to be laid in the venue so selected by the plaintiffs.

4. The questions presented by this case are of great and recurring significance under the General Venue Statute. Unless guide lines are established the question of venue against partnerships engaged in multi-state activities will remain unresolved. These questions should be laid at rest.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

ROBERT M. HITCH
DAVID L. FREEMAN

Dated: April —, 1962.

HITCH, MILLER, BECKMANN & SIMPSON
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Of Counsel

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8348.

Robert E. Lee & Co., Inc., and Dixie Construction Company of Georgia, Inc.,
Appellees,

versus

Nathan Thomas Veatch and Thomas B. Robinson, doing business as Black & Veatch,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, AT GREENVILLE. CHARLES C. WYCHE, DISTRICT JUDGE

(Argued October 6, 1961. Decided December 8, 1961.)

Before SOBELOFF, Chief Judge, and SOPER and BOREMAN, Circuit Judges.

Wesley M. Walker (Fletcher C. Mann, Menefee D. Blackwell, Donald L. Dorei, Leatherwood, Walker, Todd & Mann, and Caldwell, Blackwell, Oliver & Sanders on brief) for Appellants, and Robert M. Hitch and David L. Freeman (Watkins, Vandiver, Freeman & Kirven and Hitch, Miller & Beckmann on brief) for Appellees.

SOBELOFF, Chief Judge:

The question to be decided is whether the venue provisions of 28 U.S.C.A. § 1391 (c) are applicable to corporations suing as plaintiffs, as well as to those named as defendants. The District Court decided that these provisions are so applicable. 195 F. Supp. 528 (W.D.S.C. 1961). We, however, conclude that they are not.

An action was brought by Dixie Construction Company of Georgia, Inc., a Georgia corporation, and Robert E.

Lee & Co., Inc., a South Carolina corporation, in the United States District Court for the Western District of South Carolina on a cause of action arising out of the furnishing of certain allegedly incorrect engineering data to them by Nathan Veatch and Thomas Robinson. The defendants are residents of Missouri and do business under the name of Black & Veatch. Federal jurisdiction was founded solely on diversity of citizenship, and venue was asserted by the plaintiffs to lie in the Western District of South Carolina because both plaintiff corporation were licensed to do business, and were actually doing business, there. The District Court overruled the defendants' motion to dismiss, and an interlocutory appeal was permitted under 28 U.S.C.A. § 1292(b) [1] to review the court's holding that suit had been brought in an appropriate district.

Section 1391(c) provides that "[a] corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." The precise issue of statutory interpretation in the present case is whether, as the plaintiff corporations contend, the statute not only makes a corporation amenable to suit in a district where it is licensed to do business but also gives it access to that court to bring suit as plaintiff; or whether, as the defendants contend, the statute deals with venue as to corporate defendants only.

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[1] This section provides in part:

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, • • •."

Venue is a concept old in our jurisprudence. As opposed to jurisdiction, which relates to the territorial power of a court to hear a controversy, venue relates only to the place where a litigant may require the case to be heard. It is a privilege which permits the one in whose favor it runs to have the case tried at a convenient place. It is personal, however, and unless asserted, may be waived. See *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 168 (1939).

Prior to 1948, general federal venue was governed by section 51 of the 1911 Judicial Code, 36 Stat. 1101. This section, in pertinent part, provided that where the jurisdiction of the district courts rested only on the fact "that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." Residence was the key, and the Supreme Court, in an "unbroken line of decisions," had declared that for venue purposes the residence of a corporation was in the state, or district thereof, of incorporation. See *Suttle* v. *Reich Bros. Co.*, 333 U.S. 163, 166 (1948).

There was, however, an exception to this general immunity of a corporation from suit elsewhere than its place of incorporation. It could be sued in a district in which it was licensed to do business. This exception was based on the principle that, by obtaining a license to do business in a state and appointing an agent for service of process, the corporation waived any venue privilege it might have had not to be sued there. *Neirbo Co.* v. *Bethlehem Corp., supra.* The Court in *Neirbo* in no way purported to re-define the residence of a corporation for venue purposes, or to equate "residence" generally with "licensed to do business or doing business." This is made clear in the *Suttle* case where the Court was called upon to interpret section 52 of the 1911 Judicial Code, 36 Stat. 1101. This section provided that if two or more defendants

reside in different districts of a state, suit may be brought in either district, and the Court in *Suttle* held that a corporate resident of Texas and a resident of the Western District of Louisiana could not over objection be jointly sued in the Eastern District of Louisiana even though the Texas corporation had qualified to do business in that district. The Court was careful to point out that, while the Texas corporation had made itself amenable to suit in the Eastern District of Louisiana, this did not make it a resident of that district for venue purposes; hence the requirements of section 52 were not met. The consequence of this ruling was, of course, that corporations of different states could not be joined as defendants in the federal courts, if they chose to assert their venue privilege, unless suit could be brought at the residence of the plaintiff.[2]

This is the setting in which Congress in 1948 enacted section 1391. Subsection (a) is declaratory of the old rule that in a diversity suit venue lies in the district where all the plaintiffs or all the defendants reside, but subsection (c), quoted above, was added. Although this subsection has been a prolific source of litigation, no case has been found in which an appellate court has undertaken to decide whether subsection (c) simply codifies the *Neirbo*

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[2] The Court's comment on *Neirbo* is significant here: "This Court held that the venue requirements in the federal courts may be waived and that the defendant, since it had appointed an agent to receive service of process in New York pursuant to a statute of that State, might not insist upon suit being brought in Delaware, the State of its incorporation, or in New Jersey, the State in which plaintiffs resided. But this Court did not hold that in losing the privilege of insisting upon suit in districts specified in § 51 of the Judicial Code [36 Stat. 1101], the defendant corporation thereby acquired 'residence' in New York, within the meaning of the venue statutes. Indeed, the Court specifically stated that the suit 'was not brought "in the district of the residence of either the plaintiff or the defendant."' " 333 U.S. at 167-68.

rule (that a corporation waives its venue privilege not to be sued in a state by obtaining a license to do business there) and overcomes the awkward result of the *Suttle* case, which prevented the free joinder of corporate defendants; or whether it is a general provision re-defining the residence of all corporation, plaintiffs as well as defendants. The district courts are in conflict,[3] as are leading text-writers.[4]

An argument that the subsection re-defines corporate residence generally, is that the second clause of the sub-

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[3] That section 1391(c) is a general provision, defining the residence of all corporations, plaintiffs or defendants, has been determined by Judge Ryan in *Freiday* v. *Cowdin*, 83 F. Supp. 516 (S.D.N.Y. 1949); Judge Freed in *Hadden* v. *Barrow, Wade, Guthrie & Co.*, 105 F. Supp. 530 (N.D. Ohio 1952); Judge Dimock in *Southern Paperboard Corp.* v. *United States*, 127 F. Supp. 649 (S.D.N.Y. 1955); Judge Lord in *Eastern Motor Express* v. *Espenshade*, 138 F. Supp. 426 (E.D. Pa. 1956); Judge Sheehy in *Standard Insurance Co.* v. *Isbell*, 143 F. Supp. 910 (E.D. Tex. 1956); Judge Warlick in *Travelers Insurance Co.* v. *Williams*, 164 F. Supp. 566 (W.D.N.C. 1958); and Judge Egan in *Consolidated Sun Ray, Inc.* v. *Steel Insurance Co.*, 190 F. Supp. 171 (E.D. Pa. 1961).

The contrary conclusion has been reached by Judge Switzer in *Chicago & North Western Ry.* v. *Davenport*, 94 F. Supp. 83 (S.D. Iowa (1950); Judge Kraft in *Albright & Friel, Inc.* v. *United States*, 142 F. Supp. 607 (E.D. Pa. 1956); and Judge Robinson in *Nebraska-Iowa Bridge Corp.* v. *United States*, 158 F. Supp. 196 (D. Neb. 1958). Compare *Jaftex Corp.* v. *Randolph Mills, Inc.*, 282 F. 2d 508, 518 (2d Cir. 1960) (concurring opinion); *Lipp* v. *National Screen Service Corp.*, 95 F. Supp. 66, 69 (E.D. Pa. 1950); *United Merchants & Manufacturers* v. *United States*, 123 F. Supp. 435 (M.D. Ga. 1954).

[4] Professor Moore is of the view that the subsection does not define corporate residence generally. 1 Moore, Federal Practice 1503 (2d ed. 1950).

Barron and Holtzoff think otherwise. 1 Barron and Holtzoff, Federal Practice and Procedure 387-88 (rev. ed. 1960).

section ("and such judicial district shall be regarded as the residence of such corporation for venue purposes") would be meaningless if not so interpreted. Indeed, Judge Ryan in *Freiday* v. *Cowdin*, 83 F. Supp. 516 (S.D.N.Y. 1949), declared: "[T]o conclude otherwise one would have to attribute to Congress the anomalous intent to define the residence of corporate defendants but not that of corporate plaintiffs." 83 F. Supp. at 518.

This reasoning, however, assumes the very point to be established, namely, that Congress meant by subsection (c) to change for venue purposes the law with respect to the residence of plaintiff corporations as well as defendant corporations. No such purpose can be gathered from the legislative history, and having regard for the guidelines laid down by the Supreme Court for interpreting the Judicial Code, we think the proposition must fall. At most, the statute is ambiguous, and as stated by the Court in *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 227 (1957), "'* * * it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'"

It is urged that since the term "such corporation" in the second clause of the subsection, as a matter of syntax, refers back to the antecedent phrase, "A corporation may be sued," therefore, "such corporation" means any corporation which may be sued, i.e., is amenable to suit, not only one that is actually sued. Consequently, according to this argument, the second clause should be read as defining the residence for venue purposes of all corporations which are amenable to legal action; whether in the particular case the corporation is made a defendant or makes itself a plaintiff. This argument is not sufficient to demonstrate a clear congressional purpose to change the prior law as to plaintiff corporations.

It seems to us more probable that the term "such corporation" was meant to limit the applicability of the sub-

section to defendant corporations, for the corporations referred to in the opening words of the section are those that are sued, not those that sue. This would certainly be the more natural usage of the "such." If the purpose of the subsection was to define the residence of all corporations, plaintiffs as well as defendants, the expected mode of expression would be "a corporation may sue or be sued." Moreover, had Congress designed to give the subsection the sweeping effect urged by the plaintiffs, a term like "all corporations" would have been used in the second clause, instead of the restrictive term "such corporation." In summary, we think it would be inappropriate to read something into the statute which could have been so easily expressed, had this been within the congressional aim.

Lastly, the corporate plaintiffs contends that the second clause of the subsection is reduced to a mere redundancy if it does not define corporate residence generally. But this overlooks the fact that the subsection, even if not so broadly construed, changes the result reached by the Court in the *Suttle* case, for corporations of different states may now be freely joined as defendants in a district of common operation—an undoubted congressional objective according to the commentators.[5] See 1 Moore, Federal Practice 1503, 1554-555 (2d ed. 1950); 1 Barron and Holtzoff, Federal Practice and Procedure 376, 386 (rev. ed. 1960). Compare *Keller-Dorian Colorfilm Corp.* v. *Eastman Kodak Co.*, 88 F. Supp. 863 (S.D.N.Y. 1949);

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[5] The Reviser's Notes seem to support this view. His comment is:

"In subsection (c), references to defend 'found' within a district or voluntarily appearing were omitted. The use of the word 'found' made said section 111 ambiguous. The argument that an action could be brought in the district where one defendant resided and a nonresident defendant was 'found' was rejected in *Camp* v. *Gress*, 1919, 39 S.Ct. 478, 250 U.S. 308, 63 L.Ed. 997. However, this ambiguity will be obviated in the future by the omission of such reference."

Guy F. Atkinson Co. v. *City of Seattle*, 159 F. Supp. 722 (W.D. Wash. 1958).

Finally, while we are mindful of the desirability of corporations being suable where they are doing business, the only instance in which Congress has, with clarity, authorized a corporation to come into court as a plaintiff at its place of doing business (other than in the place of incorporation) is where the corporation seeks to recover taxes. See 28 U.S.C.A. § 1402(a)(2) (Supp. 1960). This fairly indicates that residence was not expanded by section 1391(c) to permit a plaintiff corporation the wide latitude contended for in the selection of a forum.

Reversed and remanded.